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No. 564

Supreme Court of the United States

OCTOBER TERM, 1968

CONFEDERATION LIFE ASSOCIATION, a Canadian corporation, *Petitioner*,

v.

MANUEL ANTONIO VEGA y ARMINAN, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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September 25, 1968

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OCTOBER TERM, 1968

No.

CONFEDERATION LIFE ASSOCIATION, a Canadian corporation, *Petitioner,*

v.

MANUEL ANTONIO VEGA Y ARMINAN, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioner, Confederation Life Association, prays that a writ of certiorari issue to review a judgment of the Supreme Court of Florida. Without such a review there will stand a denial of justice by reason of the refusal of that court to respect or even take notice of the rights of Petitioner under international law and the Constitution of the United States.

OPINIONS BELOW

The opinion of the Circuit Court of the 11th Judicial Circuit in and for Dade County, Florida, is not reported. That opinion appears in the Appendix hereto beginning at page 1a. The opinion of the Third District Court of Appeal of Florida, which affirmed the judgment of the Circuit Court and which ordered entry of judgment against Petitioner, is reported at 207 So.2d 33 and appears in the Appendix hereto beginning at page 11a. The memorandum opinion of

the Supreme Court of Florida affirming the judgment below is reported at 211 So.2d 169 and appears in the Appendix hereto beginning at page 22a.

JURISDICTION

The judgment of the Supreme Court of Florida was rendered on May 29, 1968. A timely petition for rehearing, with special attention to the questions of international and constitutional law ignored in the court's opinion, was denied by the Supreme Court of Florida on July 1, 1968. (R. 8, p. 1.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

Whether execution of the judgment below, by enlarging the obligations of Petitioner, a foreign national, under a contract with another foreign national, made and to be performed in a foreign nation, and by requiring Petitioner to violate the laws of that nation, would

1. cause the United States to violate international law,

2. interfere in the conduct of foreign relations of the United States, and

3. deprive the Petitioner of property without due process of law in violation of the Fourteenth Amendment.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the jurisdiction of the federal courts to apply international law, the prerogative of the federal Executive to conduct the foreign relations of the United States, and the provision of the Fourteenth Amendment prohibiting any State from depriving any person of property without due process of law.

STATEMENT OF THE CASE

Petitioner is one of a number of foreign insurance companies writing insurance throughout the world that come under the jurisdiction of our courts because of insurance written here. Through a branch in Havana, Cuba, Petitioner has written insurance in Cuba, payable in Cuba, and for which it maintains in Cuba the investments necessary to meet its obligations there. These assets cannot be transferred by the company to make payments outside Cuba even on its Cuban policies. (R. 5, p. 49; App. 4a.) Petitioner's Havana branch is subject to severe penalties ("intervention"—in effect, confiscation of its assets) if Petitioner makes payments on its Cuban policies outside of Cuba even from its resources outside of Cuba. (R. 5, p. 50.)

Respondent was until the latter part of 1960 a resident of Cuba and Respondent was and remains a citizen of Cuba (See R. 5, pp. 71-72, 83-84; App. 1a.)

On February 2, 1928, Respondent applied to Petitioner's authorized agent in Havana, Cuba, for a $5,000 life insurance policy requiring an annual premium of $242. The policy (Contract No. 273,630) was issued to Respondent in Havana. (R. 5, p. 71; App. 1a.) It provided that "All payments within the policy, whether they be on the part of the company or the insured, will be effected in the City of Havana, Republic of Cuba. . . ." (R. 5, p. 28.) The insurance contract provided further that any cash surrender value payment "is subject to the condition that there are no legal restrictions." (R. 5, p. 19.)

Both the application and the policy were in the Spanish language. (R. 5, p. 53; see R. 5, pp. 60, 99.)

In 1928, when the policy was issued, the dollar was legal tender in Cuba, *i.e.*, had "debt redeeming force"

under Cuban law, and accordingly the policy was written in dollars. On June 30, 1951, pursuant to legislation duly enacted, the dollar ceased to be legal tender for the discharge of debts payable in Cuba and became simply a foreign currency. (R. 5, p. 46.) All outstanding dollar obligations payable in Cuba became payable in Cuban pesos at the rate of one peso to the dollar. (R. 5, pp. 46-47, 50-51.)

In January 1959, the Batista Government of Cuba was overthrown and replaced by the Castro Government. This new government was and continues to be recognized by the United States and Canada as the Government of Cuba.

On February 23, 1961, the Cuban Government enacted Law No. 930. It provided that the Banco Nacional de Cuba shall control the issue of currency, and that its currency shall be the only "legal tender and shall be admitted in payment of all obligations demandable in the Republic." Obligations agreed upon to be payable in other currency *"shall* be settled and paid *necessarily"* in pesos. (Emphasis added.) Payment abroad even with funds situated abroad is declared to be a felony. (R. 4, p. 49.)

Cuban Law No. 568, enacted October 2, 1959, had earlier forbidden the export of currency or securities, or the transfer of funds abroad except in cases authorized by the Cuban Currency Stabilization Fund. Any unauthorized transfer is made a felony punishable by from six months to three years in prison, or a fine, or both. Corporations "presumed to have infringed the provisions of this law" may be "intervened." (R. 5, pp. 49, 50.) Respondent does not contend he has obtained the authority from the Cuban Currency Stabi-

lization Fund required under Cuban law to collect outside of Cuba on an obligation payable in pesos in Cuba.

In the uncontroverted sworn opinion of the expert witness on Cuban law, the effect of the Cuban laws just discussed is to "prohibit payment to the Plaintiff in any currency other than Cuban Pesos . . ." and to prohibit "payment in any place other than Cuba." (R. 5, p. 51.) Petitioner could not pay Respondent in satisfaction of the judgment directed by the Florida courts without violating Cuban law and incurring severe penalties—even confiscation of its Cuban assets. (R. 5. p. 50.) Petitioner's assets in Cuba, moreover, were invested there and have been maintained there precisely for the purpose of enabling it to make payment on its Cuban insurance contracts. (R. 5, pp. 55-56.)

On December 3, 1960, Respondent wrote to Petitioner demanding payment in dollars in Florida of the cash surrender value of the policy. On December 14, 1960, Petitioner replied offering to make payment in pesos in Cuba in accordance with the Cuban laws governing the policy and in accordance with the express terms of the policy specifying Havana, Cuba, as the place of payment. Petitioner at all times has stood ready to make such payment, or to maintain the policies in effect while both parties await changes in the political and legal climate in Cuba where the assets held for payments under Cuban policies are fully invested.

In Petitioner's reply it was explained to Respondent that

> "The assets which provide for the payment of the above policy are also fully invested in Cuba. We

> are doing our utmost to protect the interests of all our Cuban policyowners but we have been able to find no way to transfer payments from pesos in Havana to any other country." (R. 5, pp. 55-56.)

On March 14, 1966, Respondent petitioned the Circuit Court of the 11th Judicial Circuit, Dade County, sitting in chancery, to order Petitioner to pay to Respondent, in dollars in Miami, the cash surrender value of the life insurance policy. On cross-motions for summary judgment, the Circuit Court ruled for Respondent "on the issue of liability," and provided for a further hearing "to determine the exact amount due for the cash surrender value of this insurance policy sued on and the amount of Attorneys' fees to be awarded to the Plaintiff." (App. 10a, 11a.) The District Court of Appeal for the Third District affirmed the Circuit Court's decision. (App. 21a.) Petitioner then petitioned to the Supreme Court of Florida for review, and on review by writ of certiorari the Supreme Court of Florida, in a brief per curiam order, affirmed, the Chief Justice dissenting. (App. 22a.) Petitioner's petition to the Florida Supreme Court for rehearing and clarification of its decision, praying that the court rule on Petitioner's constitutional and international law arguments, was denied.

The essence of Petitioner's defense throughout the state court proceedings was threefold. First, every aspect of the insurance transaction sued on, including the place of performance, being Cuban, Cuban law governs the transaction, and under Cuban law the Petitioner's obligation to Respondent could be satisfied by Petitioner only by payment to the Respondent of Cuban pesos in Havana, Cuba. Second, since the contract provided for payment in Cuba (and, by operation of

Cuban law, for payment of pesos in Cuba), and since Petitioner was ready to fulfill that obligation, Petitioner had not breached its contract. Third, to ignore these defenses would violate international law, interfere in the conduct of foreign relations, and deprive the Petitioner of property in violation of the Fourteenth Amendment. (R. 5, pp. 32-33, 36-45, 63; R. 7, pp. 2-3.)

The courts in their opinions dealt only with the first and second defenses summarized above and took no notice of the federal and international points strongly urged by the Petitioner. The Circuit Court and the District Court of Appeal relied heavily upon an 1857 decision of this Court, *Secombe* v. *Steele,* 61 U.S. (20 How.) 94, but that decision simply applied federal common law in a situation which had nothing to do with whether a state court may enlarge the obligations of a foreign national under a foreign contract that had no connection whatsoever with the United States.

REASONS FOR GRANTING THE WRIT

This is one of a series of suits brought by Cuban citizens in United States courts seeking payment in dollars in the United States of the cash surrender value of life insurance policies purchased in Cuba from Canadian insurance companies. Suits on such policies payable in Cuba are presently pending in Massachusetts and New York as well as Florida. The decision in this case is contrary to the leading decided cases. *Confederation Life Ass'n* v. *Ugalde,* 164 So.2d 1 (Fla. 1964), *cert. denied,* 379 U.S. 915; *Present* v. *United States Life Ins. Co.,* 96 N.J. Super. 285, 232 A.2d 863 (1967), *aff'd,* 51 N.J. 407, 241 A.2d 237 (1968). Compare *Varas* v. *Crown Life Ins. Co.,* 204 Pa. Super. 176, 203 A.2d 505 (1964), *cert. denied,* 382

U.S. 827.* See also *Dougherty* v. *Equitable Life Assur. Soc'y and 25 Other Cases,* 266 N.Y. 71, 193 N.E. 897 (1934); *Home Ins. Co.* v. *Dick,* 281 U.S. 397; *Norman* v. *Baltimore & Ohio R.R.,* 294 U.S. 240.

This is the only case in which an express provision for payment in Cuba has been disregarded. It is also the only case in which the record showed that the company maintained assets in Cuba to cover *fully* its Cuban obligations. It is thus a case of flagrant interference by the courts of a state in transactions with which the state had no connection. It is thus a case where the courts of a state have changed the obligations of parties to a contract, expressly embodied in that contract, giving one party a recovery not contemplated in the contract at the expense of the other. It is thus a case where the injury to Petitioner, which has maintained investments in Cuba to cover its Cuban obligations, and which remains subject to Cuban law in regard to these policies, is indisputably clear; Petitioner stands to have its Cuban assets confiscated if it satisfies the Florida courts' judgment. The District Court and the Supreme Court of Florida have each expressly denied Petitioner's request that their opinions face up to and pass upon the questions of constitutional law and international law raised by their subjecting Petitioner to liability by the application of Florida law to a transaction with which Florida had and has no significant connection.

1. Violation of International Law

International law is violated when a court, under the guise of applying a local conflict of laws rule, undertakes to alter rights and obligations of a national of a

* The *Varas* case differed fundamentally from the leading cases cited and from this case in that the contract there did not designate Cuba as the place of payment.

foreign state arising out of a transaction having no substantial contact with the forum state. Restatement, The Foreign Relations Law of the United States, § 19 (1965).* When, as here, the foreign national is injured by this process, "the court commits an international delict and subjects the State to diplomatic representations or the possible award of damages or other reparation by an international tribunal." Stevenson, *The Relationship of Private International Law to Public International Law,* 52 Col. L. Rev. 561 (1952) at 574, citing Beckett, *What Is Private International Law?,* 7 Brit. Y. B. Int'l L. 73, 75 (1926). See also League of Nations Doc. No. 1929. V. 10 at 10-11; Hague Codification Conference of 1930, Minutes of the Third Committee, League of Nations Doc. No. 1930. V. 17 at 237; 5 Hackworth, *Digest of International Law* 526 *et seq.* (1943) and cases there cited; Briggs, *The Law of Nations* 678 (1952); Brierly, *The Law of Nations* 215 (4th ed. 1953).

The United States Government itself has espoused a similar claim on behalf of a United States citizen. In *The Alsop Claim (United States* v. *Chile),* submitted under Protocol of 1909, 5 Am. J. Int'l L. 1079 (1911), the United States contended that the application of Chilean law by a Chilean court, in a suit brought by a United States citizen asserting rights under an alleg-

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* "[A] state cannot obtain control over conduct not within its jurisdiction to prescribe by applying a choice of law rule designed to govern conduct rather than to adjudicate claims growing out of conduct." *Id.,* Comment d. The earlier draft put the same rule as follows: "[A] state cannot obtain control over conduct not within its jurisdiction to prescribe by the simple device of inventing a choice of law rule to be applied in the particular case for the purpose of giving effect to a rule of its own law designed to govern conduct." *Id.* (Proposed Official Draft, 1962).

edly Bolivian contract, wrongfully deprived the United States citizen of contractual interests possessed under controlling Bolivian law, "for which action the Government of Chile is liable to respond in damages under . . . well-known and universally recognized principles of international law . . . ." U.S. Dep't of State, The Alsop Claim—The Case of the United States 211 (G.P.O. 1910). The principle, which the tribunal did not question,* clearly applies here where the rights of the Respondent and Petitioner were established under Cuban law before Respondent left Cuba and made demand in Florida.

In *Lauritzen* v. *Larsen,* 345 U.S. 571, a limited construction was given by this Court to the jurisdictional scope of the Jones Act primarily because a broader construction would not have been in conformity with principles of international law just discussed. The case involved negligent injury to a Danish seaman on board a Danish ship in Havana harbor. The employment contract was made in New York, the seaman was returned to New York at the completion of the agreed period of service, and the ship itself frequently and regularly stopped at United States ports. *Id.* at 582-83. The Court, after noting that contacts with Denmark were nevertheless clearly predominant, observed

> "in dealing with international commerce we cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided; nor should we forget that any contact which we hold sufficient to warrant application of our law to a

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* The tribunal denied the claim for failures in the claimant's proof of Bolivian law. See 5 Am. J. Int'l L. at 1097.

> foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction." *Id.* at 582.

Our statutes, the Court declared, should be "construed to apply only to areas and transactions in which American law would be considered operative under prevalent doctrines of international law." *Id.* at 577.

In *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, following *Lauritzen,* the Court declared:

> "The controlling considerations are the interacting interests of the United States and of foreign countries, and in assessing them we must move with the circumspection appropriate when this Court is adjudicating issues inevitably entangled in the conduct of our international relations. We need not repeat the exposition of the problem which we gave in *Lauritzen* v. *Larsen.* Due regard for the relevant factors we there enumerated, and the weight we indicated to be given to each, preclude application of American law to the claims here asserted." *Id.* at 383.

The fact that a state court rather than a federal court has sought to impose its law to control the transaction at bar is no defense to the United States under international law. See, *e.g.,* 5 Hackworth, *Digest of International Law* 595 (1943); Restatement, The Foreign Relations Law of the United States, § 170 (1965). The issue of whether the Florida courts' judgment places the United States in violation of international law is therefore one of direct and paramount federal concern.

This was settled in *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398, 425, where the Court expressly approved the view of Professor Philip C. Jessup, now a

member of the International Court of Justice, "that rules of international law should not be left to divergent and perhaps parochial state interpretations." *Ibid.* Such matters, the Court said, "must be treated exclusively as an aspect of federal law." *Ibid.*

Apart from the violation of substantive international law there will be a denial of procedural justice under international law if the decision below is permitted by this Court to stand. Procedural justice under international law will have been denied on two counts, first, the refusal of the courts to pass upon the constitutional and international law issues involved and, second, the bias manifested against Petitioner, a Canadian company, and the prejudice disclosed against respect for the currency laws of another country because of the courts' dislike for the regime now ruling there.*

Denial of this petition would give Canada grounds for seeking from the United States reparation under international law for the losses inflicted in this case and the series of cases which may follow its lead.

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* The Florida Circuit Court's opinion ill conceals its bias against Petitioner, and in favor of "these new Americans," deprived, the court said, of what "is rightfully due them . . . while Defendant's coffers bulge with bullion . . .." (App. 8a.) The exercise of such bias against a foreign national clearly constitutes a denial of justice, as does the refusal of the Florida courts to consider and pass upon Petitioner's claims. Restatement, The Foreign Relations Law of the United States, § 185; Freeman, International Responsibility of States for Denial of Justice 328-331 (1938).

The courts might have shown less bias against Petitioner had they taken into account that Petitioner is a mutual company with a great many American policyholders whose annual insurance cost is increased whenever a court awards any policyholder more than his policy insures him against. Petitioner's American policyholders will be among those injured if Petitioner is visited with a double injury through application of the Cuban penal laws which the decisions here would require Petitioner to violate.

2. Interference in the Conduct of Foreign Relations

The judgment of the Florida courts amounts to a direct interference in the conduct of foreign relations of the United States. Under doctrines that this Court has very recently had occasion to reaffirm, such a judgment cannot constitutionally stand.

The recent decision of this Court to which we refer is *Zschernig* v. *Miller,* 389 U.S. 429, decided just last term. There the Oregon court applied its inheritance statutes in such a way as to interfere with the foreign relations power. In *Zschernig,* this Court, reviewing the decisions of state courts respecting inheritances of citizens of so-called "iron curtain" countries that followed *Clark* v. *Allen,* 331 U.S. 503, found that the decisions "radiate some of the attitudes of the 'cold war,' where the search is for the 'democracy quotient' of a foreign regime as opposed to the Marxist theory." 389 U.S. at 435. As the Court continued, "That kind of state involvement in foreign affairs and international relations—matters which the Constitution entrusts solely to the Federal Government—is not sanctioned by *Clark* v. *Allen.*" *Id.* at 436. The attitudes of the courts which this Court found interfered with foreign policy are catalogued in *Zschernig. Id.* at 437-439, n. 8.

The Court found that the Oregon courts in the decisions leading up to *Zschernig* had in fact decided whether or not a foreign legatee was entitled to inherit by construing the statute in accord with a "[so]cial criticism of nations established on a more auth[oc]rarian basis than our own." *Id.* at 440. This, [the] Court found, "affects international relations in a [per]sistent and subtle way." *Ibid.* Regulation by [the] states of descent and distribution of estates must [follow] a way if it

impairs "the effective exercise of the Nation's foreign policy." *Ibid.* And, like Oregon's action in *Zschernig,* Florida's action here "has a direct impact upon foreign relations and may well adversely affect the power of the central government to deal with those problems." 389 U.S. at 441. Like Oregon's action in *Zschernig,* Florida's action here illustrates "the dangers which are involved if each State, speaking through its . . . courts, is permitted to establish its own foreign policy." *Ibid.*

The decision of the Florida courts similarly is based primarily upon foreign policy considerations. The distaste of the judges below for the present Government of Cuba (not to mention the foreign nationality of the insurer) has infected their decisions in a way indistinguishable from cases outlined by this Court in *Zschernig* v. *Miller,* 389 U.S. at 437-439, n. 8, and is, flatly, an interference by the state courts in an area that is forbidden to them by this Court's decision. To allow a court's view of the economic or political system prevailing in the foreign country to influence its decision, as this Court held in *Zschernig* v. *Miller,* is an interference with the exclusive prerogative of the Federal Government to conduct our foreign policy.

3. Deprivation of Property Without Due Process

The application of Florida law by the courts below, to create rights and impose obligations where none exists under Cuban law, and to compel Petitioner to make a payment which it is prohibited from making by Cuban law, violates the Fourteenth Amendment.

In an unbroken line of decisions this Court has recognized the rule that the Fourteenth Amendment forbids a court of the United States from applying the substantive law of the forum to enlarge obligations under a

contract that is clearly governed by foreign law. *Clay* v. *Sun Ins. Office, Ltd.*, 377 U.S. 179, 181-82; *Clay* v. *Sun Ins. Office, Ltd.*, 363 U.S. 207, 210-11; *Watson* v. *Employers Liab. Assur. Corp.*, 348 U.S. 66, 70-73; *Lauritzen* v. *Larsen*, 345 U.S. 571, 590-91; *Hartford Accident & Indem. Co.* v. *Delta & Pine Land Co.*, 292 U.S. 143; *Home Ins. Co.* v. *Dick*, 281 U.S. 397; *Aetna Life Ins. Co.* v. *Dunken*, 266 U.S. 389, 399-400; *New York Life Ins. Co.* v. *Dodge*, 246 U.S. 357; *New York Life Ins. Co.* v. *Head*, 234 U.S. 149; *Allgeyer* v. *Louisiana*, 165 U.S. 578; *cf. McGee* v. *International Life Ins. Co.*, 355 U.S. 220; *International Shoe Co.* v. *Washington*, 326 U.S. 310. See also *Zimmermann* v. *Sutherland*, 274 U.S. 253, 255-56; *Deutsche Bank Filiale Nurnberg* v. *Humphrey*, 272 U.S. 517, 519. The decision below wholly ignores this settled rule.

The decision below is particularly repugnant to the command of the Fourteenth Amendment in that it not only applies local law to alter and enlarge obligations pertaining to a transaction with which the forum has no significant contact, but seeks affirmatively to compel Petitioner to violate the law of Cuba—the only jurisdiction with which the transaction has significant contacts. Even where the forum has predominant interests in the matter being litigated, this Court has recognized the constitutional problem that is presented by an order requiring a party to violate foreign law. *Société Internationale* v. *Rogers*, 357 U.S. 197, 211-12.

CONCLUSION

Execution of the judgment below would (1) cause the United States to violate international law, (2) interfere in the conduct of our foreign relations and (3) deprive Petitioner of property without due process of

law. Furthermore, refusal of the courts below to pass upon these constitutional and international law issues constitutes a denial of procedural justice, itself a violation of international law. Petitioner accordingly prays that this petition for certiorari be granted.

Respectfully submitted,

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September 25, 1968

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